Supreme Court, U.S.
FILED
MAR 31 1997
CLERK

No. 96-1394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ESTEBAN ORTIZ, *et al.*,

Petitioners,

vs.

FIBREBOARD CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS CONTINENTAL CASUALTY COMPANY, CNA CASUALTY COMPANY OF CALIFORNIA, COLUMBIA CASUALTY COMPANY AND PACIFIC INDEMNITY COMPANY

Paul J. Bschorr
Richard B. Sypher
David F. Owens
DEWEY BALLANTINE
1301 Avenue of the Americas
New York, NY 10019
(212) 259-8000

Counsel for Respondent Pacific Indemnity Company

Herbert M. Wachtell*
Meyer G. Koplow
Jeffrey M. Wintner
Meir Feder
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
(212) 403-1000

Counsel for Respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company

* *Counsel of Record*

(Counsel Continued Inside)

Additional Counsel for Respondent Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company:

Rodney L. Eshelman
Donald T. Ramsey
CARROLL, BURDICK
& MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

Stuart Philip Ross
Sean M. Hanifin
Merril J. Hirsh
ROSS, DIXON & MASBACK, L.L.P.
601 Pennsylvania Avenue, N.W.
North Building
Washington, D.C. 20004
(202) 662-2000

Otis Carroll
Bill Parker
IRELAND, CARROLL
& KELLEY, P.C.
6101 S. Broadway, Suite 500
Tyler, TX 75703
(903) 561-1600

Additional Counsel for Respondent Pacific Indemnity Company:

John H. Minton
Michael E. Jones
POTTER, MINTON, ROBERTS,
DAVIS & JONES, P.C.
P.O. Box 359
Tyler, TX 75710
(903) 597-8311

PARTIES TO THE PROCEEDINGS

The petition accurately lists the parties to the proceeding with the following exceptions. William James Mitchell is a plaintiff class representative not listed in the petition; other parties not listed in the petition are Paul Cochran, Ida Beck and Marion Behee.

The following are parents of respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company: CNA Financial Corporation; Loews Corporation. The following are non-wholly owned subsidiaries of respondent Continental Casualty Company: Convida Holdings, Ltd.; Convida Compania de Seguros de Vida S.A.; Agency Management Services, Inc.

The following are parents of respondent Pacific Indemnity Company: The Chubb Corporation; Federal Insurance Company. There are no non-wholly owned subsidiaries of respondent Pacific Indemnity Company.

TABLE OF CONTENTS

	Page
Parties to the Proceedings	i
Table of Contents	ii
Table of Authorities	iv
Statement of the Case	1
A. Background and Procedural History	4
B. The Uncontested Record	5
1. The risk posed to the class by the coverage dispute required a unitary resolution among all parties.	6
2. The Trilateral Agreement is markedly inferior to the Global Settlement from the perspective of class members.	9
3. The plain language of Rule 23(b)(1)(B) is met in this case.	11
4. Bankruptcy was not an available option for the class.	12
5. The Global Settlement is financially fair.	13
Reasons for Denying the Writ	15
I. This Case Does Not Present the Rule 23 Issue Involved in *Amchem*.	15

Contents

		Page
II.	Petitioners' Contrived Article III "Issue" Does Not Warrant Review By This Court	18
III.	This Case Does Not Present Issues Raised in *Adams v. Robertson*.	20
IV.	Petitioners' Remaining Contentions Are Not Certworthy.	27
Conclusion		29

Contents

Page

TABLE OF AUTHORITIES

Cases Cited:

Adair v. New River Co., 32 Eng. Rep. 1153 (Ch. 1805) 22, 23

Adams v. Robertson, No. 95-1873 ..... *passim*

Amchem Products, Inc. v. Windsor, No. 96-270 ..... *passim*

Brown v. Booth, 21 Eng. Rep. 960 (Ch. 1690) 22

Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), *cert. dismissed as improvidently granted*, 51 U.S. 117 (1994) 26, 29

Brown v. Vermuden, 22 Eng. Rep. 796 (Ch. 1676) ... 22

Chancey v. May, 24 Eng. Rep. 265 (Ch. 1722) 22

Crawford v. Honig, 37 F.3d 485 (9th Cir. 1994) 26

Dawson v. Columbia Trust Co., 197 U.S. 178 (1905) 18

EEOC v. American Tel. & Tel. Co., 556 F.2d 167 (3d Cir. 1977) 19

Good v. Blewitt, 33 Eng. Rep. 343 (Ch. 1807) 22

Contents

	Page
Grimes v. Vitalink Communications Corp., 17 F.3d 1553 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994)	26
Hanna v. Plumer, 380 U.S. 460 (1965)	20, 28
Hartford Life Ins. Co. v. Ibs, 237 U.S. 662 (1915) ...	21
Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) .	19
In re Agent Orange Prod. Liab. Litig., 996 F.2d 1425 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994)	26
In re A.H. Robins Co., 880 F.2d 709 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989)	26
In re Drexel Burnham Lambert Co., 960 F.2d 285 (2d Cir. 1992)	29
In re Joint E. and S. Dist. Asbestos Litig., 78 F.3d 764 (2d Cir. 1996)	29
In re Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721 (2d Cir. 1992)	29
In re Real Estate Title, 869 F.2d 760 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989)	26
Keene Corp. v. Fiorelli, 14 F.3d 726 (2d Cir. 1993) ..	28, 29
Leigh v. Thomas, 28 Eng. Rep. 201 (Ch. 1751)	22

Contents

	Page
McArthur v. Scott, 113 U.S. 340 (1885)	17
Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47 (1971)	18
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)	*passim*
Muskrat v. United States, 219 U.S. 346 (1911)	18
Norwood v. Kirkpatrick, 349 U.S. 29 (1955)	27
Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 24, 25, 26	
SEC v. Randolph, 736 F.2d 525 (9th Cir. 1984)	19
Semegen v. Weidner, 780 F.2d 727 (9th Cir. 1985) ...	27
Smith v. Swormstedt, 57 U.S. [16 How.] 288 (1853) .	*passim*
Swift & Co. v. United States, 276 U.S. 311 (1928) ...	19
United States v. City of Alexandria, 614 F.2d 1358 (5th Cir. 1980)	19
United States v. Johnson, 319 U.S. 302 (1943)	18
United States v. Union Pac. R.R. Co., 98 U.S. 569 (1878)	27

Contents

Page

Statutes Cited:

11 U.S.C. § 305(a)(1) 29

28 U.S.C. § 1404 27

Federal Rules of Civil Procedure:

Rule 23(b)(1)(B) ..... *passim*

Rule 23(b)(3) 24

Rule 23(e) 19

Other Authorities Cited:

Story, *Commentaries on Equity Pleadings*, § 100 (2d ed. 1840) 21

Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39 (1967) 24

Z. Chaffee, *Some Problems of Equity* (1950) 21, 23

13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3530 19

STATEMENT OF THE CASE

In an attempt to leverage themselves upon two cases considered by the Court this term, petitioners have presented the class action settlement in this case (known as the "Global Settlement") and the Fifth Circuit decision approving it in a totally misleading fashion. They portray the Global Settlement as a carbon copy of the settlements in *Amchem Products, Inc. v. Windsor*, No. 96-270 and *Adams v. Robertson*, No. 95-1873 (writ dismissed as improvidently granted, March 3, 1997), cases involving the issue whether class settlements may be approved on the basis of projected increased efficiency over individual adjudications in the tort system. But as both lower courts expressly found — in findings petitioners wholly ignore — the basis of the Global Settlement here is decidedly different: a unitary class settlement was necessary in this case *in order to secure the class's only possible source of meaningful recovery*. App. 39a, 41a, 197a-198a, 207a.

On August 27, 1993, when the Global Settlement was reached in principle, the parties were confronted with the following circumstances. The class, comprised of over 100,000 future asbestos claimants, had potentially well over $1 billion in claims against Fibreboard Corporation. Fibreboard, however, also faced $2 billion in *current* settlement obligations, and had non-insurance assets sufficient to pay no more than a small fraction of these amounts. App. 8a, 243a. Instead, the source of *any* meaningful recovery for class members lay in two insurance policies that Fibreboard had purchased in the 1950s from respondents Continental and Pacific. Although Fibreboard claimed that these policies provided it with no-aggregate-limit coverage, the two insurers were disputing coverage in a massive California litigation that, as both lower courts found, Fibreboard had a "significant risk" of losing outright. App. 18a, 41a-42a, 323a. The very morning of the agreement in principle, the California Court of Appeal had heard the final argument in that coverage litigation and announced its intention to rule expeditiously.

For class members, then, a settlement of the coverage dispute was the only possible alternative to catastrophic risk: a Fibreboard loss in the coverage litigation would render their claims against Fibreboard, no matter how meritorious, virtually worthless. App.

41a, 323a-324a. But as the District Court found and the Fifth Circuit confirmed, a settlement of the coverage dispute was possible only as part of a unitary resolution involving the class. App. 197a-198a, 207a, 340a-341a, 41a-42a. Fibreboard — which viewed a potential victory in the coverage dispute as giving it no-aggregate-limit insurance coverage sufficient to ensure its survival — was not about to settle that dispute unless its survival was ensured by such a settlement: a result that realistically could be achieved only by a settlement binding on all claimants. *See* pp. 6-7, *infra*. The insurers, likewise, were not about to agree to pay out the billions of dollars necessary to make any overall settlement fair unless they could be certain that all future claimants, as well as Fibreboard, were bound by that settlement. As the District Court put it, "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised." App. 198a, 41a-42a, 47a-51a. *See* pp. 6-8, *infra*.

This case thus presents precisely what is *absent* in *Amchem* and was *absent* in *Adams*: a uniquely compelling reason why a unitary class settlement was necessary. This compelling reason, moreover, was "commonly held" by class members, each of whom shared the risk of a Fibreboard defeat in the coverage litigation and, consequently, an overriding interest in a settlement that would fairly resolve that risk. App. 24a-25a & n.8. And contrary to petitioners' repeated insinuations, the Global Settlement — while resolving these commonly held issues "regarding insurance coverage for the class' injuries and establishment of an equitable distribution process to insure that all class members receive compensation" where there may not be enough money to go around — did *not* liquidate the recoveries of individual class members. App. 24a & n.8.

As such, this case does not present the novel issues involved in *Adams* and *Amchem*:

(1) It does not present the question raised in *Adams* whether opt-out rights may be denied as to claims for money damages simply because a proposed settlement would provide equitable remedies that would be more efficient than individual suits for damages in the tort system. To

the contrary, as detailed below, the plain language of Fed. R. Civ. P. 23(b)(1)(B) and hundreds of years of precedent from this Court and at common law make clear that a non-opt-out class is called for where, as here, a unitary resolution is necessary to protect the class. *See* pp. 20-27, *infra*.

(2) It does not present the question that the petitioners say is raised in *Amchem* whether a settlement may be used "as a sufficient basis in and of itself to" certify a class. Pet. 12. To the contrary, the Fifth Circuit — in a portion of its opinion that petitioners conspicuously fail to mention — expressly *disavowed* any such settlement-alone-suffices approach, as did the District Court. App. 23a-24a & n.8; 190a; *see* pp. 15-17, *infra*. Indeed, the Fifth Circuit indicated its "likely agree[ment]" with the result reached by the Third Circuit in *Amchem* on the apparent facts of that case. App. 24a n.8.

(3) And, finally, this case does not present the claims raised in both *Adams* and *Amchem* about the fairness of the settlement in question: petitioners do not contend now, and did not contend below, that the over-$1.5 billion fund that the Global Settlement creates for the class is unfair.

Instead, this case presents unique circumstances in which class members needed a unitary resolution in order to resolve a common overwhelming risk; in which no one disputes that the plain language of Rule 23(b)(1)(B) authorized a non-opt-out class; in which an indisputably fair unitary resolution was reached and was approved, after exhaustive inquiries, by the courts below; and in which the appropriateness of such a resolution was established by centuries of jurisprudence. As petitioners' own counsel has acknowledged (in a statement completely contrary to the thesis of the petition), the Fifth Circuit decision does not "offer significant precedent for future . . . class actions" because "Fibreboard presented such a unique fact pattern that I do not believe it will ever arise again. [The panel's decision is] only precedent for a class action in the event there is a dispute between an insurance company and an insured where the insured would go insolvent otherwise. That won't

occur very often." Business Insurance, August 5, 1996, at 38. There is accordingly no reason for further review by this Court, and the petition should be denied.

A. Background and Procedural History

The Global Settlement, reached on the very eve of the potentially final appellate argument in the coverage litigation after extended, hard-fought negotiations, resolves the risks that litigation posed to the class, to Fibreboard and to the insurers. It does so on financial terms that not even petitioners claim are unfair to the class: payment of over $1.5 billion to be placed in an asset-conserving, independent Trust for the benefit of "future" claimants in return for their releasing Fibreboard and the insurers from personal injury asbestos claims. App. 15a-16a. And it accomplishes this in a manner that maximizes the amount of money class members will actually receive, by capping claimants' attorney's fees at 25% (well below the 33-40% norm) and by dramatically reducing the costs of defense. App. 328a-331a.

Equally important, however, is what the Global Settlement does *not* do: it does *not* liquidate a single personal-injury tort claim for money damages; and it does *not* deprive class members of their right to control their individual claims. App. 24a & nn. 7-8, 50a-51a. Instead, those claims will be liquidated on an individual basis as they arise. Individual claimants may either resolve their claims consensually with the Trust through *non*-binding negotiation, mediation or arbitration; or — if they are dissatisfied with their proposed recovery for any reason — they have the absolute right to exit into the tort system to litigate their claims, with the Trust substituting for Fibreboard as the defendant. App. 16a, 312a.* In short, the Global Settlement resolves *only* class members' overriding common interests in ending the enormous risk posed to all of them by the coverage litigation, and does *not* resolve the matters — what each of them will recover — as to which they may differ.

---

* As set forth below, the Global Settlement — in order to preserve the trust corpus for the benefit of all claimants — does place certain limitations on claimants once they exit to the tort system. Both the Fifth Circuit and the District Court found those limitations not to be significant. *See* pp. 13-14, *infra*.

So the District Court found in comprehensive findings of fact, conclusions of law and an extensive opinion issued after an eight-day live fairness hearing featuring testimony by 18 witnesses, hundreds of exhibits and full procedural rights afforded to petitioners — a hearing which itself followed broad rights of discovery exercised by petitioners and an unprecedented $18 million worldwide mail, newspaper and television campaign designed to bring notice of the proposed settlement and the fairness hearing to persons having an interest in the matter. App. 149a-479a. The District Court found, as noted above, that the risks posed to all parties by the coverage dispute could be resolved only through a unitary settlement encompassing all claims, and that "[t]he need to protect Class members' common interests in the insurance proceeds subject to the coverage dispute demand[ed] a unitary resolution permitting equitable distribution." App. 198a, 197a, 207a. It went on to find that the Global Settlement is fair to the class, and — given the risks posed by the coverage dispute — indeed represents a "far superior" outcome for the class than any practical alternative. App. 207a, 332a-333a.

The Fifth Circuit affirmed the District Court's findings, conclusions and opinion, with one judge dissenting; it thereafter denied petitioners' suggestions for rehearing *en banc*, with six judges dissenting. Respondents respectfully refer this Court to the District Court's extensive findings and to the Fifth Circuit majority opinion for a full description of the Global Settlement and the circumstances and negotiations that led to it.*

B. The Uncontested Record

Petitioners, however, wholly ignore the findings of the courts below, and instead portray this case in a manner diametrically

* Respondents also respectfully refer the Court to the brief in opposition they have submitted today to a second petition for writ of certiorari filed in this case by a separate group of petitioners (the "Flanagan Petitioners"). *Flanagan v. Ahearn*, No. 96-1379. That brief fully responds to the Flanagan Petitioners' gross mischaracterization, repeated in part by petitioners here and by the dissent below, of the Global Settlement negotiations and particularly of the limited role in those negotiations played by Judge Parker.

opposed to those findings. They proceed as if there were somehow no need for the class to participate in a settlement here; as if the Global Settlement actually liquidated the individual recoveries of hundreds of thousands of individual tort claimants; and as if it had nothing to recommend it other than alleviating docket congestion. Pet. 1, 22. They then purport to cloak themselves in the due process rights of future asbestos victims — the very class members *most* at risk from the coverage dispute, since Fibreboard's meager non-insurance assets would be long exhausted before their injuries become manifest — and ostentatiously proclaim that those rights have been cast aside by "judicial legislation" "foist[ed] upon the class" in order to bail out "mass tort defendants" and "insurance titans." Pet. 16-17, 22, 26.

This presentation — which is obviously intended to deflect attention from the fact that, under petitioners' version of the law, there was simply *no way* for the class to protect itself against the risk of the coverage dispute — was roundly rejected by both courts below and is nothing short of a fantasy. This is clearly shown by factual findings made by the District Court and affirmed by the Fifth Circuit that appellants pretend do not exist, but nowhere seriously dispute.

1. The risk posed to the class by the coverage dispute required a unitary resolution among all parties.

For all their rhetoric, petitioners never take issue with the findings of the District Court and the Fifth Circuit that "[r]esolution of the insurance dispute required a unitary settlement in a proceeding in which all claims were compromised." App. 198a, 207a, 41a. Indeed, for months in the spring and summer of 1993, as they had earlier, Fibreboard and one insurer (Continental) had tried to achieve a "bilateral" settlement of the coverage dispute *without* the participation of the plaintiffs — and had failed. App. 279a-280a. As the lower courts determined, the unique circumstances of this coverage dispute — involving a claim of no-aggregate-limit, billion-dollar-plus coverage on which the insured's corporate survival was entirely dependent — did not permit a piecemeal settlement. App. 197a-198a, 207a.

To the contrary, Fibreboard's coverage claims were the only thing that stood between it and insolvency — it believed it would remain a viable company, solve its asbestos problem and preserve its net worth *if* it prevailed in the coverage litigation; it would be immediately bankrupt if it lost. App. 323a-324a. Accordingly, it was not about to settle that litigation on terms that would still potentially leave it facing bankruptcy. Unless it were to receive from the insurers a sum of money sufficient absolutely to ensure that it would be in a position to pay all asbestos claims and all costs of defense in an ongoing litigation regime, it was not willing to leave itself naked of insurance and yet exposed to further claims by asbestos plaintiffs. App. 274a-275a, 340a. If that were its only option under a settlement, management could meet its obligations to shareholders only by litigating the coverage dispute to conclusion. *Id.* Thus, from Fibreboard's standpoint, any settlement of that dispute either had to (1) be so financially lucrative that there was no real risk that future asbestos liabilities and defense costs would place its corporate existence in jeopardy; or (2) involve the asbestos plaintiffs.

The insurers, for their part, were certainly willing to put enormous funds on the table to rid themselves of the potential open-ended, no-limit exposure claimed by Fibreboard. But they were not willing to forgo their substantial arguments disputing coverage — on which, as the expert witnesses at the fairness hearing testified and the District Court and Fifth Circuit found, they had a significant chance of escaping any liability at all (App. 18a, 41a-42a, 323a) — by giving Fibreboard so much money that its survival would be placed absolutely beyond question in the face of continued asbestos claims and defense costs. App. 295a-296a. Nor were they willing to pay the enormous sums entailed by a settlement without ensuring that they had ended their exposure once and for all. The Fifth Circuit fully compiled the reasons why the insurers could not afford to remain exposed to opt-outs, not the least of which was that the timing of the coverage appeal would have entailed giving class members the right to opt-out *after* the outcome of the appeal was known, and hence a one-way option on the coverage litigation. App. 9a-10a, 272a-273a, 340a. If those were the alternatives, the *insurers* would litigate the coverage dispute to conclusion. *Id.* Thus, from

the insurers' standpoint, any settlement of the coverage dispute involving sums acceptable to Fibreboard had to involve all the asbestos plaintiffs.

The situation facing the class was thus simple. The insurers and Fibreboard could not come to terms on a settlement of the coverage dispute without involving the asbestos plaintiffs. For that very reason, however, the class had enormous negotiating leverage over both the insurers and Fibreboard, each of which faced catastrophic risk if the coverage dispute continued. Those parties were consequently offering the class a tremendous amount of money as part of a global settlement of their claims — an amount that, while not guaranteeing all class members a 100% recovery, was indisputably a fair resolution of their claims. App. 63a-64a, 325a-327a.* The class could either secure that enormous fund for itself, or run the significant risk of losing the insurance entirely by pressing forward with a quixotic pursuit of what remained of Fibreboard's non-insurance assets. App. 42a-43a.

In light of this, petitioners' portrayal of the Global Settlement as an unnecessary expedient designed to let big business off the hook is grossly inaccurate. When the actual nature of the circumstances that gave rise to the Global Settlement are considered, the true import of petitioners' arguments become clear: as they would have it, class members — as a matter of their *own* due process rights, no less — had no alternative but to continue to suffer the risks of the coverage litigation. In other words, they simply *had to* act against their own best interests.

---

* Petitioners' constant assertions that the class lacked "leverage" and that Fibreboard and the insurers had "enormous power" over the class (Pet. 12) are thus completely contrary to fact. Instead, far more probative on this point than petitioners' empty posturing is their tacit concession that the Global Settlement — despite the class's supposed lack of "leverage" in negotiating it — is financially fair to the class. Indeed, petitioners never even raised any such claim of supposed lack of leverage below; and, as the lower courts found, the background to the Global Settlement negotiations actually gave the class *additional* leverage over the insurers: Fibreboard's prior program of settling claims by "assigning" rights under its insurance policies had substantially inflated settlement values, and class counsel were able to use those values to ratchet up the class's recovery. App. 374a.

2. The Trilateral Agreement is markedly inferior to the Global Settlement from the perspective of class members.

The absolute need for a unitary resolution on these facts is perhaps best demonstrated by what petitioners claim to be their saving grace — the "Trilateral Agreement" between Fibreboard and the insurers. The Trilateral Agreement grew out of a last-minute demand by class counsel that, as a condition to the class's entry into the Global Settlement, Fibreboard also settle the insurance dispute directly with the insurers as a "back-up" to the Global Settlement, so as to ensure that — even if the Global Settlement were not approved — the coverage dispute would not proceed. App. 295a-296a. The Trilateral Agreement accomplishes that, for the same consideration *from* the insurers as the Global Settlement. App. 327a-328a.* However, it does not provide the same benefits *to* class members. Because it leaves class members' claims to be resolved in litigation against Fibreboard — and does not provide for the equitable distribution and asset-conservation procedures established by the Global Settlement — it leaves class members exposed to a race to the courthouse, higher transaction costs (including contingency fees), dissipation of the insurance proceeds through enormous defense costs, and a significant risk that the money will run out before all sick claimants get paid. App. 39a, 324a-325a, 327a-332a.

The record is uncontroverted that Fibreboard never would have acceded to the Trilateral Agreement except as a condition to a unitary resolution through the Global Settlement. App. 279a-280a. Indeed, Fibreboard resisted to the end the concept that the Trilateral Agreement would require the insurers to pay it no more than they were to pay under the Global Settlement, claiming instead that Fibreboard needed many additional hundreds of millions of dollars

---

* Although the insurers would pay $2 billion to Fibreboard under the Trilateral Agreement (as compared with $1.525 billion to the Trust under the Global Settlement), the additional $475 million was agreed to be paid because under the Trilateral Agreement — but not the Global Settlement — Fibreboard would continue to bear responsibility for hundreds of millions of dollars of "presents" claims and certain other liabilities. App. 320a-321a.

to pay for the defense costs it would incur in the tort system and to protect against the uncertainties of futures claims estimates. App. 295a-296a. The record thus completely belies the unexplained assertion of the dissent below, echoed by petitioners here, that "[t]he *Ahearn* settlement is really two agreements: one between Fibreboard and the insurers to settle their policy disputes for $1.525 billion, and another between the futures class and Fibreboard to limit the class's recovery to insurance proceeds plus $10 million of Fibreboard's $225-250 million net worth. Fibreboard and the insurers did not need class proceedings to reach the first agreement." App. 84a. (The dissent's assertion also totally ignores that the Trilateral Agreement — which it inaccurately denominates the "first agreement" — likewise *did* "need class proceedings" to be accomplished. Indeed, the same judge who so vehemently dissented from the Global Settlement as illegitimately certifying a class of future asbestos claimants simultaneously voted, without explanation, to *affirm* the District Court's approval of the "back-up" Trilateral Agreement even though it involved certification of the virtually *identical non-opt-out futures class.*[*])

The record is equally clear, moreover, that the class would suffer under the Trilateral Agreement in comparison with the Global Settlement: as the District Court and Fifth Circuit found, the Trilateral Agreement (though a fair resolution of the coverage dispute as between Fireboard and its insurers) is "far" inferior to the Global Settlement from the point of view of the *class* and does not provide enough money to guarantee payment — full or partial — to future asbestos claimants. App. 39a, 51a, 324a-325a. To the contrary, the record is uncontested that, due to the enormous defense expenditures entailed by resolving claims in litigation and the large

---

[*] The Trilateral Agreement was conditional on issuance of a final judgment that, in pertinent part: (a) certified the same mandatory class of future asbestos claimants; and (b) declared that the Trilateral Agreement represented a fair settlement of the coverage dispute and cut off any rights class members might have under the insurance policies. That judgment has been issued in a companion case below (*Continental Cas. Co. v. Rudd*), and the dissenting judge and these petitioners supported issuance of that judgment even though many of the legal theories they advance would render that judgment invalid as well. App. 84a, 20a.

contingency fees charged by plaintiffs' lawyers, the class would in the aggregate receive at least several hundred million dollars *less* under the Trilateral Agreement than under the Global Settlement, and a significant number of class members might well receive *nothing* at all. App. 324a-325a, 327a-328a.

For example, the expert testimony at the fairness hearing was that the class would receive $234-477 million *less* under the Trilateral Agreement than under the Global Settlement, even taking Fibreboard's equity into account. App. 327a-328a, JA7: 2054-56, 2768-70; JA125.* There was also expert testimony that, as a consequence — whereas under the Global Settlement it was more probable than not that *all* future claimants would receive fair and appropriate compensation (App. 325a) — under the Trilateral Agreement: (a) 41-50% of the class, between 104,000 and 127,000 asbestos claimants, would likely be left unpaid (JA117, 118); and (b) Fibreboard "would be unable to pay all the valid claims against it within five to nine years." App. 39a. As the District Court found on the full record, there is a "significant risk" that the Trilateral Agreement would leave "a late-comer component" of the class completely uncompensated. App. 325a, 328a.

3. The plain language of Rule 23(b)(1)(B) is met in this case.

For all petitioners' alliterative flourishes about the alleged "blatant bootstrapping of a 23(b)(3) class into a 23(b)(1)(B) class" (Pet. 22), they *never once* dispute that a non-opt-out resolution is authorized here by the plain language of Rule 23(b)(1)(B). Indeed, even the dissent below expressly acknowledged as much. App. 98a. That language calls for a unitary resolution where allowing individual opt-outs would "create a risk" that other class members would "as a practical matter" suffer a "substantial[ ] impair[ment] . . . [of] their ability to protect their interests." Fed. R. Civ. P. 23(b)(1)(B). In other words, in the view of the Advisory Committee (which drafted the Rule), this Court (which endorsed it) and Congress (which passed upon it), individuals cannot opt out of a

---

* Citations to "JA" refer to portions of the Joint Appendix in the Fifth Circuit not reproduced in petitioners' appendix.

class where their doing so would irretrievably prejudice their fellow class members' claims. And that, as no one contests, is exactly what would have happened here, by creating the serious risks that all of the class would have recovered nothing via the coverage litigation, or that much of the class would have recovered nothing under the Trilateral Agreement. App. 42a-43a, 51a, 323a-325a.

Faced with this, petitioners are left only with a hair-splitting distinction that they do not even argue has any basis in the language of Rule 23(b)(1)(B). They contend that a unitary resolution would have been permitted had class members' claims been "*in rem*" claims against a pre-existing "common, limited" fund, but that such a resolution becomes somehow impermissible here because class members needed a unitary resolution in order to secure a fund to compensate them in the first place. Pet. 21-22. They do not explain, however, the supposed significance of this "distinction": certainly it appears nowhere (a) in the language of Rule 23(b)(1)(B), which does not refer to "*in rem*" claims or "common" or "limited funds" at all; (b) in the Advisory Committee Notes to the Rule, which specifically state that the Rule is to operate "in the absence of a fund either present or potential" (Advisory Committee Notes to 1966 Amendment to Rule 23(b)(1)(B)); or (c) in any decided case.

4. Bankruptcy was not an available option for the class.

Although petitioners hint that bankruptcy would have provided an alternative to a unitary class resolution (Pet. 24), they do not quarrel with one central fact: class members could *not* have put Fibreboard into bankruptcy in August 1993. App. 44a, 342a. Bankruptcy proceedings could have been reached only by forcing Fibreboard to litigate for *and lose* its claimed insurance, the only source of real recovery for the class. App. 42a-43a. Petitioners' suggestion, then, is that the class was required — *required* — to spurn $1.535 billion from the insurers and Fibreboard, and force Fibreboard to roll the dice in the coverage litigation: secure in the knowledge that, though the coverage might be lost, a bankruptcy proceeding in which class members would receive pennies on the dollar, if anything, would be waiting to "protect" them.

5. The Global Settlement is financially fair.

Finally, despite their vitriol about "gold turned to lead" and the alleged sacrifice of the class's rights (Pet. 22), petitioners do *not* assert that the Global Settlement is financially unfair to the class. Indeed, the substantive fairness of this settlement is beyond dispute. This settlement transforms disputed insurance coverage into over $1.5 billion cash, and transfers it to independent Trustees for the class's benefit, for distribution to class members in accordance with procedures that ensure that the proceeds will not be dissipated on Fibreboard's costs of defense or plaintiffs' transaction costs (including contingency fees).*

These overwhelming benefits, as the District Court and Fifth Circuit found, far outweigh the few minor ways in which the Settlement might affect the amount of damages some claimants might receive for their claims. App. 338a-340a, 51a. Indeed, these effects are caused principally by provisions of the Settlement designed to *protect* the interests of the very class members about whose rights petitioners profess concern — by avoiding inequitable dissipation of the trust funds through disproportionate windfall awards — and should have only minimal impact in practice on class members' individual recoveries.**

---

* Recognizing that the Global Settlement's undisputed fairness demonstrates the emptiness of his "sky-is-falling" rhetoric, the dissenting judge below conjured up an alternate theory to explain why the Global Settlement's fairness has not been challenged: that the "futures" nature of the class impeded fairness-based objections. App. 81a-82a. This theory has no basis in reality. *First*, though this is a "futures" class, a "future" claimant is defined as a person who had not *filed a claim* against (or settled with) Fibreboard prior to August 27, 1993. There are thus tens of thousands of class members with currently manifest injuries. Indeed, there have been thousands of exigent claims settled and paid under the Trust procedures since 1993. *Second*, there is a highly organized and motivated plaintiff's asbestos bar, members of which would likewise not have hesitated to object if they thought the Global Settlement were unfair or otherwise inimical to class members' interests (as many of them in fact did in *Amchem*).

** For example, while petitioners complain vociferously about several of the "limitations" imposed by the Global Settlement (Pet. 7):

(Cont'd)

And while in an ideal world it might have been desirable from the class's standpoint to have Fibreboard's $235 million in equity added to the Settlement (or for that matter, $235 million more from the insurers), this was a *settlement* in which each of the parties had to make concessions to achieve a resolution that avoided the very major litigation risks that otherwise confronted *each* of them. App. 41a, 326a, 339a-342a. The important questions are thus whether the $1.535 billion the class was able to extract — whether it comes entirely from the insurers, or were hypothetically to be made up of $1.3 billion from the insurers and $235 million from Fibreboard — is fair and reasonable in light of the risks posed by the coverage dispute, and whether receipt of that fund and resolution of those risks warrants the limitations discussed above. Petitioners do not contest the lower courts' affirmative findings on either point.

(Cont'd)

(1) the $500,000 cap on compensatory damages reflects the facts that only a handful of the over 100,000 plaintiffs to have sued Fibreboard before the Global Settlement was reached had ever recovered more than $500,000 in compensatory damages against it and that the insurance policies at issue in the coverage dispute specified a $500,000 per-person limit (App. 339a);

(2) the elimination of punitive damages reflects the fact that such damages were almost never awarded against Fibreboard in the tort system (App. 338-339a);

(3) although the Settlement establishes certain prerequisites to litigation, it does not deprive class members of their right to control their individual tort claims. The claims resolution procedures thus provide for mediation, non-binding or binding arbitration at claimants' election and a pre-trial conference with the court, but preserve absolute access to the tort system against the Trust for *all* class members if they do not achieve resolutions *they* regard as satisfactory. (App. 16a, 312a); and

(4) the elimination of prejudgment interest and joint-and-several liability will have minimal impact on recoveries, since the Trust process will resolve claims far faster than the current norm and since the overall settlement amount (and hence the recoveries class members will receive) *already* reflects Fibreboard's potential joint-and-several share of other asbestos defendants' liability. App. 339a-340a.

REASONS FOR DENYING THE WRIT

When the class's overriding need for a unitary resolution through settlement and the conceded fairness of the Global Settlement here *are* considered, petitioners' wild hyperbole about the need for review by this Court completely dissipates. The Fifth Circuit's decision was based on settled law establishing the appropriateness of a unitary class resolution where necessary to protect the class; it does not present the issues raised in *Amchem* and *Adams* concerning the permissibility of such a resolution in other circumstances; and there is no cause for further review of this unique case.

I. THIS CASE DOES NOT PRESENT THE RULE 23 ISSUE INVOLVED IN *AMCHEM*.

Petitioners' claim that this case presents the Rule 23 issue under consideration by this Court in *Amchem* is based on a gross distortion of the Fifth Circuit's opinion. To be sure, the Fifth Circuit did reject the extreme position taken by the Third Circuit in *Amchem* — that a court considering certification of a settlement class must totally ignore the settlement and assess class certification "as if the case were going to be litigated." *See* App. 20a-22a. But petitioners' counsel (who likewise served as counsel to the objectors in *Amchem*) declined to defend that extreme and universally rejected position before the Court in *Amchem*,* and similarly do not seek to defend it here.

Instead, petitioners claim overlap with *Amchem* on the ground that the Fifth Circuit allegedly used the fact of a settlement "as a sufficient basis in and of itself to" certify the class. Pet. 12. *But the Fifth Circuit explicitly disavowed any such approach*, as did the District Court. To the contrary, the Fifth Circuit *agreed* with petitioners that — the existence of a settlement notwithstanding — "individual issues" and "differences in state law" would "likely" prevent certification of a settlement class "requesting *individual damages* for members of a global class of asbestos claimants." App. 23a-24a & n.8 (emphasis added). It recognized, however, that this case is fundamentally different: the class here was united in its

* *Amchem*, Tr. Oral Arg. (Feb. 19, 1997), at 40-41.

need to resolve the coverage dispute, and the Global Settlement did not resolve those matters — individual recoveries — as to which class members may differ. As the Fifth Circuit put it:

> The Global Settlement Agreement does not award damages to individual victims: it provides money and an equitable distribution process to pay victims. . . . The named plaintiffs [entered this Settlement] to avoid the risks of insurance coverage litigation and to insure that money remains available to pay their claims when they make it through the settlement and/or trial process to final judgment. The same concerns affect each member of the [class].

App. 24a-25a.*

The Fifth Circuit further underscored this point by expressly observing this case's "stark contrast" with *Amchem*, a case where, as the Fifth Circuit understood the facts:

> the settlement attempted to award damages to class members based on the severity of their injuries alone. We would *likely agree* with the Third Circuit that a class action requesting individual damages for members of a global class of asbestos claimants would not satisfy the typicality requirements due to the huge number of individuals and their varying medical expenses, smoking histories, and family situations. In [this case], only commonly held questions regarding insurance coverage for the class' injuries and establishment of an equitable distribution process to insure that all class members receive compensation were decided. As a result, this settlement is unaffected by the typicality and commonality problems cited in [*Amchem*].

App. 24a n.8 (emphasis added).

* Indeed, the District Court determined that the class here could be certified even "under the assumption that Rule 23(a)'s requirements are no different in the settlement context than in the litigation context" (App. 190a) — thereby finding that the class could be certified even under the extreme Third Circuit position in *Amchem*.

It is thus not even remotely true, as petitioners extravagantly claim, that "[u]nder the Fifth Circuit's interpretation of Rule 23, literally anyone can be a common, typical, and adequate representative of any random group of people, so long as that person negotiates a class settlement on behalf of that group." Pet. 12. Nor is there any basis whatever for petitioners' constant assertion that the opinion below allows class certification where a settlement first "creates" "common" issues that did not exist "*before* the negotiation" (Pet. 21, 12 (emphasis in original)): as the Fifth Circuit recognized, the class's common need to resolve the coverage dispute created the Global Settlement, not the other way around.*

Once stripped of these baseless assertions, the petition presents only factbound questions under settled law: whether class members had common interests, and whether the class representatives and class counsel adequately served those interests in fairly resolving the coverage dispute. That fact-specific inquiry has already been conducted *three* times — by the guardian ad litem (Professor Eric Green) appointed by the District Court to review the fairness of the Global Settlement from the class's standpoint, by the District Court and by the Fifth Circuit — and there is no cause for yet a fourth look by this Court.**

---

* Here and throughout, moreover, petitioners suggest that this class is somehow additionally suspect because it contains future claimants. Indeed, petitioners flatly state that "the settlement releases *future* claims for which no representative could *ever* be considered typical." Pet. 14 (emphasis in original). These assertions are unadorned by analysis or citation, and are belied by both. Classes containing "future" claimants grew out of the ages-old practice of permitting representatives to litigate and settle actions on behalf of unborn heirs or other future interests (such as those regarding trusts), *see, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *McArthur v. Scott*, 113 U.S. 340, 401-02 (1885). Class resolutions on behalf of future schoolchildren, future prisoners and future housing tenants are accordingly a familiar part of modern jurisprudence, necessary to avoid constant relitigation. What matters is that class members share an identity of interests — not, as petitioners would have it, that all their precise identities be known.

** Petitioners' oblique suggestion that the Court should grant review

(Cont'd)

II. PETITIONERS' CONTRIVED ARTICLE III "ISSUE" DOES NOT WARRANT REVIEW BY THIS COURT.

The Article III "issue" raised in the petition is at odds with settled law and does not warrant review by this Court.* Although derisively referring to this case as a "contrivance between friends" and a "joint venture, not an adversarial lawsuit" (Pet. 16-17), petitioners concede that there was a real controversy among the class, Fibreboard and the insurers before the Global Settlement was reached. Pet. 16.** Their contention, however, is that "[h]ow much

---

(Cont'd)

because it is allegedly not possible ever to give adequate notice to "futures" (Pet. 15) ignores settled law that due process requires only the "best notice practicable" where future claims are involved. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317 (1950). Petitioners do not contend that the notice campaign here — the most expensive in history — did not meet this standard. Moreover, as petitioners concede (Pet. 15 n.6), the provision of notice here was not complicated by any need by class members to make an immediate opt-out decision. Indeed, the supposed constitutional defects in the provision of notice here would equally have invalidated the provision of notice in the *Rudd* action regarding the Trilateral Agreement; yet petitioners affirmatively argued that the provision of notice there was constitutional.

* The petition's repeated suggestions that this "issue" is to be decided in *Amchem* are misleading. The Court granted certiorari in *Amchem* only on the Rule 23 questions addressed by the Third Circuit. That petitioners' counsel — respondents' counsel in *Amchem* — chose to raise a perceived Article III issue in their brief in that case rather than defending the rationale adopted by the Third Circuit does not mean that this case should be held for *Amchem* simply because counsel has raised the same "issue" here.

** Petitioners could hardly argue otherwise: as the Fifth Circuit and District Court found, class members, Fibreboard and the insurers obviously had conflicting interests regarding Fibreboard's claimed insurance coverage and the payment of class members' claims. This is in sharp contrast to the cases cited by petitioners, in which the parties' interests were never in conflict. *See Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47 (1971); *United States v. Johnson*, 319 U.S. 302, 304 (1943); *Muskrat v. United States*, 219 U.S. 346, 361 (1911); *Dawson v. Columbia Trust Co.*, 197 U.S. 178, 180-81 (1905).

struggle took place *before* the pleadings were submitted to the district court . . . proves nothing about the existence of a justiciable controversy *in that* court" (*id.* (emphasis in original)): in other words, that an indisputably real controversy is transformed into an unconstitutional "joint venture" where the terms of a settlement are reached prior to the filing of the complaint.

Settled law has dismissed this proposition ever since this Court's decision in *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928), rejected an identical Article III objection to a consent decree that was likewise reached prior to the filing of a complaint and was then presented to the District Court for approval concurrently with the filing of a complaint. *Swift*'s holding has been uniformly applied by the courts of appeals, and such consent decrees (and related settlements such as pre-packaged bankruptcies) have become a regular and salutary practice by which parties can resolve their differences without first instituting costly and often compromise-inhibiting litigation while not forfeiting the ability to obtain judicial oversight of issues that may arise.* There is no reason for the Court to revisit this issue.

Nor is there any plausible distinction of *Swift* (the petition does not even make the attempt). To the contrary, *Swift*'s holding applies *a fortiori* in this class action context, because Fed. R. Civ. P. 23(e) affirmatively *requires* court approval of class settlements. Indeed, precisely because of this approval requirement, this Court has held that the existence of a class settlement does not spell the end of an Article III controversy until approval is received. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 371 n.10 (1982). And the effect of petitioners' argument on class actions would be absurd. In addition to invalidating the practice of consent decrees and pre-packaged

---

* *See, e.g., SEC v. Randolph*, 736 F.2d 525 (9th Cir. 1984); *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir. 1980); *EEOC v. American Tel. & Tel. Co.*, 556 F.2d 167 (3d Cir. 1977); *see also* 13 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3530, at 320 (noting that Article III is satisfied in such situations because, in "[c]ases involving genuinely adversary interests, but lacking any dispute as to facts or remedy . . . . [t]here may be a very real need to secure a judicial decree to establish status or rights, or assist in their enforcement, even though there is no present dispute").

bankruptcies, petitioners would institute a regime in which potential class litigants would be well advised not even to talk prior to litigating, for if such talk led to the misfortune of the parties agreeing on a settlement before a complaint were filed, they would have *ipso facto* rendered it impossible to proceed. Article III, as petitioners would have it, would operate to foreclose any means of obtaining the required court approval.

III. THIS CASE DOES NOT PRESENT ISSUES RAISED IN *ADAMS V. ROBERTSON.*

Nor does this case present the questions the Court was unable to reach in *Adams v. Robertson. Adams* involved the issue whether state rules of procedure may constitutionally provide for certification of a mandatory class action where there is no claim by the parties that affording opt-out rights would prejudice class members' claims. Here, by contrast, petitioners do not contest that the plain language of Fed. R. Civ. P. 23(b)(1)(B) calls for a unitary resolution on the facts of this case, or that many class members would be severely prejudiced and potentially recover nothing on their claims if opt-outs were instead permitted. *See* pp. 11-12, *supra.*

The upshot of petitioners' due process argument, unlike that in *Adams*, is thus twofold: *first*, that this Court should hold — for the first time ever — that an intended application of a Federal Rule would be unconstitutional, and that "the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule [does not] transgress[ ] . . . constitutional restrictions" (*Hanna v. Plumer*, 380 U.S. 460, 471 (1965)); and *second*, that the federal courts are constitutionally foreclosed from achieving a unitary resolution whenever the class asserts "*in personam*" claims (Pet. 18), no matter how draconian the consequences to the class. Unlike the novel issues at stake in *Adams*, both of these implausible arguments fly in the face of settled precedent, and this Court's review is not warranted.

1. As detailed in the Fifth Circuit's opinion, centuries of jurisprudence establish that opt-out rights are not constitutionally required where "equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the

parties affected," so long as those parties were "adequately represented." App. 49a. These "equitable circumstances," moreover, may exist notwithstanding that the class is seeking monetary damages.

For example, in *Smith v. Swormstedt*, 57 U.S. [16 How.] 288 (1853), this Court upheld a unitary resolution "to prevent a failure of justice" in circumstances much like those presented here: where persons with "separate and distinct" monetary claims against a pool of disputed assets brought a nationwide class suit to advance their "common interests" in establishing their joint ownership of the disputed funds and a process for equitably distributing them, but where that relief could be achieved only through a unitary resolution. *Id.* at 302-03; *see also Hartford Life Ins. Co. v. Ibs*, 237 U.S. 662, 670-72 (1915) (unitary resolution of money damages claims appropriate where necessary to protect class members' "common interests" and to avoid "destructi[on] of their mutual rights"). Likewise, in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 310-14 (1950), this Court rejected an identical due process challenge to a unitary resolution of *in personam* money damages claims arising out of alleged negligent mismanagement of a trust where such a resolution was necessary to achieve a "final settlement" of all claims involving the trust.*

2. These precedents of this Court, moreover, reflect an even longer common-law tradition of unitary class resolutions of monetary claims where necessary to prevent "a positive denial of justice" to class members. Story, *Commentaries on Equity Pleadings*, § 100 (2d ed. 1840); *see also id.* at §§ 97-98, 120-21. Mandatory "representative suits involving money claims were adjudicated in equity as a matter of course from early times" in those circumstances where class members' claims would otherwise be prejudiced. Z. Chaffee, *Some Problems of Equity* (1950), at 285. And it was well recognized that the circumstances permitting a

* Although *Mullane* was not technically a class action, it nonetheless involved a mandatory representative settlement encompassing absent and future parties from around the nation (who were represented by guardians ad litem). *See* 339 U.S. at 309-11. The Court's rejection of the due process challenge in *Mullane* is accordingly fully applicable here.

unitary resolution included suits — precisely like that here — to establish a class's joint rights to disputed assets and a process for equitably distributing them among class members. *See Leigh v. Thomas*, 28 Eng. Rep. 201 (Ch. 1751) (mandatory class action brought by two members of the crew of a privateer ship as representatives for the entire crew to establish crew members' rights to a share of prize money); *Good v. Blewitt*, 33 Eng. Rep. 343 (Ch. 1807) (same).*

3. Contrary to petitioners' unsupported assertions, moreover, the settled validity of unitary class resolutions of monetary claims is not limited to "*in rem* cases." Pet. 19. *Not a single case* even suggests, much less adopts, this supposed *in rem*/*in personam* distinction.** To the contrary, this Court flatly rejected the "distinction" in the sole case in which it was proposed. In *Mullane*, the petitioners likewise claimed that a unitary resolution violated their due process rights to the extent it encompassed *in personam*, as opposed merely to *in rem*, claims. The Court, however, squarely held that "the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon [this] classification. . . . Without disparaging the usefulness of distinctions between actions

---

* Other examples of unitary class resolutions of monetary claims at common law include *Brown v. Vermuden*, 22 Eng. Rep. 796 (Ch. 1676) (mandatory bill of peace to determine the size of payments owed to a parson by his parishioners); *Brown v. Booth*, 21 Eng. Rep. 960 (Ch. 1690) (same); *Chancey v. May*, 24 Eng. Rep. 265 (Ch. 1722) (mandatory class action brought by one proprietor of a business as representative of "all other proprietors and partners" against the former treasurers and managers of the business for several "misapplications" totalling £50,000); and *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805) (mandatory class action to recoup alleged rent overpayments under a contract to which numerous persons were parties).

** Indeed, many of the cases discussed above involved classically *in personam* claims: for example, *Mullane* expressly involved *in personam* tort claims for money damages (339 U.S at 311-14); *Smith* involved class members' assertion of "separate and distinct" legal claims of ownership of disputed funds as a matter of contract interpretation (57 U.S. at 302); *Chancey v. May*, 24 Eng. Rep. 265 (Ch. 1722), involved fraud claims against the managers of a business; and *Adair v. New River Co.*, 32 Eng. Rep. 1153 (Ch. 1805), involved alleged rent overpayments under a contract.

in rem and those *in personam* in many branches of law . . . we do not rest the power" to achieve a unitary resolution upon "this historic antithesis." 339 U.S. at 312-13.

Nor do petitioners explain the supposed significance in this context of their *in rem/in personam* "distinction." In particular, class members here needed a unitary disposition in order to secure a fund to compensate them in the first place; allowing opt-out rights would have forced the coverage litigation to proceed, and put at risk the only source of meaningful recovery. Class members here were thus *more* in need of a unitary resolution than are typical *in rem* claimants: at least the *res* in an *in rem* case will still exist absent a unitary resolution (though it may be distributed inequitably).*

4. A long line of precedent thus establishes that federal courts may achieve a unitary resolution where necessary to protect the class, and rejects petitioners' notion that individual class members have an absolute constitutional right to pursue a windfall recovery where their doing so would irretrievably prejudice their fellow class members' claims. These precedents supply ample basis to sustain the judgment of "the Advisory Committee, this Court, and Congress" in adopting the identical approach in Rule 23, and to sustain the

---

* The dissent below also contended that the historical practice of unitary resolutions of monetary claims was limited to circumstances where class members' individual claims were themselves equitable in nature. App. 95a-98a. This argument likewise flies in the face of precedent. In *Smith v. Swormstedt*, this Court made clear that the power of "a court of equity" to achieve a unitary resolution "to prevent a failure of justice" extends to "[t]he *legal* and equitable rights and liabilities of all being before the court by representation." 57 U.S. at 303 (emphasis added). Similarly, at common law, it was "immaterial" to the propriety of a unitary resolution whether "the basic issues [were] legal and not equitable." Chaffee, *supra*, at 156; *see also id.* at 151-52; *Adair*, 32 Eng. Rep. at 1159 (describing the practice as allowing "a person, having *at Law* a general right to demand service from the individuals of a large district . . . [to] sue thus in Equity," and as requiring only that enough of the individual class members be brought into court "that it can be said, they will fairly and honestly try the *legal* right between themselves, all other persons interested, and [the party opposing the class]") (emphasis added).

Fifth Circuit's application of that Rule's plain language in this case.

Rule 23(b)(1)(B), as the Fifth Circuit explained, is the present-day equivalent of the traditional class actions discussed above (App. 47a-48a); it likewise makes the propriety of a unitary disposition turn on the need to protect class members rather than on the specific type of relief class members seek.* By contrast, Rule 23(b)(3) requires opt-out rights in those actions that would *not* have qualified for class treatment at common law because class members would not be prejudiced by allowing separate suits, but as to which current procedure allows class resolution of certain "common questions" where "convenient and desirable" to "achieve economies of time, effort and expense." Advisory Committee Notes to 1966 Amendment to Rule 23(b)(3).**

5. Nor does *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), a sentence fragment of which supplies petitioners' sole claimed support for their position (Pet. 18), call the decision below into any question.

a. *Shutts* does not bear at all on petitioners' principal argument — that class members here have an absolute right to opt out no matter what their contacts with Texas. As the Court recently explained in *Adams*, *Shutts* pertains only to the question whether a "state court lacked personal jurisdiction over out-of-state class

* The Advisory Committee Notes to Rule 23(b)(1)(B) specifically refer to *Smith v. Swormstedt* as an example of an action falling within that Rule. *See* Advisory Committee Notes to 1966 Amendment to Rule 23(b)(1)(B). The remaining subsections of Rule 23(b)(1)-(b)(2) set forth other circumstances in which potential prejudice to the class or the defendant arising from opt-out rights necessitates unitary resolutions.

** In fact, "[o]pt-out class actions were unheard of before the 1966 amendments to the Federal Rules of Civil Procedure created the Rule 23(b)(3) opt-out class action." App. 49a n.16. To the extent Rule 23(b)(3) class actions are traceable to any prior procedure, it is not to the traditional class action but to the "spurious" class action first created in 1938 by original Rule 23, which fashioned what was essentially a permissive joinder device, binding class members only if they affirmatively opted *into* the class. *See* Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967).

members, not the different and broader question of whether . . . due process requires that all class members have a right to opt out" even if they are subject to personal jurisdiction in the forum court. *Adams*, 1997 U.S. LEXIS 1490, *7 (1997).

b. For three separate reasons, *Shutts* also does not support petitioners' fallback position that this Court should review whether, in a class action such as this one, opt-out rights must be given to class members "who lack minimum contacts with the forum state." Pet. 19.

First, as the Fifth Circuit observed, *Shutts* involved a "class action brought under a state rule virtually identical to [Rule] 23(b)(3)" (App. 47a) — that is, the class was certified merely for litigation convenience, and there was no issue that allowing opt-out rights would prejudice class members' claims. The Court's holding requiring opt-out rights in that context therefore did not alter the settled validity of mandatory nationwide class actions involving monetary claims where a need for a unitary resolution does exist — as typified by the Court's prior decisions in *Smith* and *Mullane*, both of which explicitly upheld mandatory class actions incorporating class members who lacked *any* contact with the forum state. *See Mullane*, 339 U.S. at 309, 311; *Smith*, 57 U.S. at 289, 303. For this reason, the *Shutts* opinion was limited to "those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments" and "intimate[d] no view concerning other types of class actions, such as those seeking equitable relief." 472 U.S. at 811-12 n.3.*

---

* As the Fifth Circuit explained, far from invalidating Rule 23(b)(1)(B)'s plain language, *Shutts* thus recognized the basic distinction made in Rule 23: unitary resolutions are permitted of those actions that fall within the federal courts' authority to fashion "equitable relief" to protect the class — class actions under Rules 23(b)(1)-(b)(2); opt-out rights are required otherwise. App. 49a & n.16.

By contrast, the two cases that petitioners claim conflict with the decision below each arose out of the same class action, in which a mandatory class was certified with respect to a "hybrid" suit involving both equitable relief and "*foreclosure* of substantial damage claims" where there were no

(Cont'd)

Second, *Shutts* — whose holding was expressly limited to class actions involving "known plaintiffs" (*id.*) — by its terms has no applicability to this futures class action. "Futures" classes such as this one aimed at improving the conditions all class members will ultimately face, but which will not liquidate their individual recoveries, are uniquely suited for mandatory class treatment. In this way, this case resembles the mandatory class actions routinely brought on behalf of future schoolchildren and future prisoners. *See* p. 17 n.*, *supra*. By contrast, a "front-end" right to opt out may be of limited practical utility to futures class members, many of whose injuries are not yet manifest. *See In re Agent Orange Prod. Liab. Litig.*, 996 F.2d 1425, 1435 (2d Cir. 1993), *cert. denied*, 510 U.S. 1140 (1994). Far more efficacious in a real world is the absolute right to exit to the tort system that the Global Settlement *does* afford to any and all class members dissatisfied with the result of the trust settlement mechanism. *See In re A.H. Robins Co.*, 880 F.2d 709, 745 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989).

Finally, *Shutts* involved a class action brought in *state* court, and has no bearing on this *federal* class action. Whereas state courts can ordinarily assert jurisdiction only over parties having minimum contacts with the state, the Constitution permits federal courts to

(Cont'd)

circumstances requiring unitary resolution of the damage claims. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992) (emphasis added), *cert. dismissed as improvidently granted*, 511 U.S. 117 (1994); *In re Real Estate Title*, 869 F.2d 760, 768 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989). Putting aside whether the underlying certification of a mandatory class in that action was proper under the Rule, these cases are plainly distinguishable from this case, where there was an overriding need for a unitary resolution to ensure a source of recovery for the class and in which the individual damages will not be adjudicated. Indeed, the Third Circuit specifically noted that it was not "address[ing] the due process requirements in a class action certified under Rule 23(b)(1) in which there is only a limited common fund from which the plaintiffs can obtain relief." *Real Estate Title*, 869 F.2d at 768 n.8. By contrast, where there is a need for unitary resolution, courts — including the Ninth and Third Circuits — have uniformly held that *Shutts* does not impose a constitutional opt-out requirement. *See, e.g., Crawford v. Honig*, 37 F.3d 485, 487 n.2 (9th Cir. 1994); *Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1560 (3d Cir.), *cert. denied*, 115 S. Ct. 480 (1994).

assert jurisdiction nationwide. *See, e.g., United States v. Union Pac. R.R. Co.*, 98 U.S. 569, 604 (1878); *Semegen v. Weidner*, 780 F.2d 727, 730 (9th Cir. 1985).*

IV. PETITIONERS' REMAINING CONTENTIONS ARE NOT CERTWORTHY.

The final section of the petition presents a grab-bag of complaints that the certification of a mandatory class in this particular case violated Rule 23 and a variety of statutes. None merit this Court's attention.

1. Petitioners' *ipse dixit* that the class was "eligible . . . for class treatment only under Rule 23(b)(3)" (Pet. 21) presents no conflict in the circuits or any other cause for this Court's review. To the contrary, petitioners nowhere dispute that the decision below was fully consistent with the plain language of Rule 23(b)(1)(B). *See* pp. 11-12, *supra*. And their selective quotation of the 23(b)(1)(B) Advisory Committee Notes — designed to create the impression that those Notes limit the Rule's operation to "*in rem* claims 'made by numerous persons against a fund insufficient to satisfy all claims' " (Pet. 21) — carefully excises the Notes' statement three sentences later that the Rule is in fact to operate "in the *absence* of a fund either present or potential." Advisory Committee Notes to 1966 Amendment to Rule 23(b)(1)(B) (emphasis added).

Moreover, petitioners' claim that the Fifth Circuit's reason for 23(b)(1)(B) certification here "is akin to that present in *every* settlement" (Pet. 22) is based upon an absurd caricature of the opinion below. The Fifth Circuit did *not* certify "a limited fund class based on the settlement's creation of that very fund." Pet. 23. Rather, it recognized that, absent a unitary resolution, the class's source of recovery would potentially be lost for reasons *unrelated* to the merits of the class's claims: through a potential Fibreboard loss in the coverage litigation. App. 42a. This holding, as the District Court explained, does *not* support the certification of a mandatory class "in the typical case where a class action is settled with a

* Accordingly, plaintiffs are routinely shuttled through the federal court system under 28 U.S.C. § 1404 to districts with which they have no contacts at all. *See, e.g., Norwood v. Kirkpatrick*, 349 U.S. 29, 30-32 (1955).

defendant's own funds, or with insurance funds that are not the subject of genuine and vigorous dispute" — in such a case, "if the settlement failed because [opt outs] were permitted, the defendant would retain the settlement funds (or the insurance coverage) and there might not be the 'impair[ment]' to class members' 'ability to protect their interests' required for mandatory class certification" by the language of Rule 23(b)(1)(B). App. 198a-199a.

2. The historical practice set forth above disposes of petitioners' Rules Enabling Act argument (an argument for which petitioners cite no authority at all, much less a circuit conflict). The appropriateness of unitary resolutions of monetary claims where necessary to protect the class dates back centuries. *See* pp. 20-27, *supra*. There thus can hardly have been a contrary "substantive right" to opt out in such circumstances in 1938, when the Enabling Act was passed, and there can hardly be such a right now. Indeed, the predicate of petitioners' contention — that each class member has a "substantive right" to full individual recovery where seeking it would irretrievably prejudice the rest of the class's claims — does not begin to overcome the heavy presumption that the Rule's plain language does not "transgress[ ] . . . the terms of the Enabling Act." *Hanna*, 380 U.S. at 471.

3. Finally, as the Fifth Circuit explained in detail, there is no conflict with the Bankruptcy Code or with *Keene Corp. v. Fiorelli*, 14 F.3d 726 (2d Cir. 1993). App. 41a-46a. As noted above, class members could not have put Fibreboard into bankruptcy in August 1993, when the Global Settlement was reached, without first forcing it to continue (and potentially lose) the coverage litigation. *See* p. 12, *supra*. Petitioners' notion that the Fifth Circuit "substitute[d] a mandatory class action settlement for bankruptcy" (Pet. 24) is thus yet another example of the dramatic license they have taken with the facts of this case.

Keene, by contrast, is different on every level. There, a former asbestos manufacturer tried to evade an immediate and otherwise unavoidable bankruptcy through a "preemptive" mandatory defendant class action seeking to *compel* all claimants to "settle" with it where no settlement existed at all. *See id.* at 728. The Second Circuit dismissed this "suit" for lack of a case or controversy and

expressly did not decide the propriety of Rule 23(b)(1)(B) certification (*see id.* at 728, 730 & n.1, 733); the portion of its opinion relied upon by petitioners is, in the Fifth Circuit's words, a "gratuitous discussion" and does not amount to a conflict warranting this Court's review. App. 41a, n. 14. (In contrast, on the occasions that the Second Circuit has actually *decided* the issue — including one decision *subsequent* to *Keene* — it has squarely held that Rule 23(b)(1)(B) may properly be applied in the case of an insolvent entity. *See In re Joint E. and S. Dist. Asbestos Litig.*, 78 F.3d 764, 777-78 (2d Cir. 1996); *In re Joint E. and S. Dist. Asbestos Litig.*, 982 F.2d 721, 737-39 (2d Cir. 1992); *In re Drexel Burnham Lambert Co.*, 960 F.2d 285, 292 (2d Cir. 1992).)

Even the *Keene* dictum, however, does not avail petitioners. *Keene* involved a situation where, unlike here, class members *could* put the former asbestos manufacturer into bankruptcy immediately and *would* be fully protected there. Quite the opposite is true here: as the Fifth Circuit found, a potential Fibreboard bankruptcy "would be too late for [class members]" (App. 45a) — who would get, at a very minimum, over $1 billion dollars less in bankruptcy than they would under the Global Settlement — and requiring them to "wait until catastrophe be[fell] . . . them as a result of the California litigation would be a denial of justice . . . and unwarranted by the law." App. 42a-43a. Indeed, the Bankruptcy Code expressly authorizes the district courts to sanction a resolution outside of bankruptcy where the relevant interests would be "better served." 11 U.S.C. § 305(a)(1).

CONCLUSION

Respondents recognize that the Court has expressed interest in the issue whether a mandatory class may be certified, as in *Adams* (and previously in *Ticor Title Ins. v. Brown*), because equitable and damages claims co-exist in a single litigation, because a settlement seeks to provide class members with equitable remedies for their money damages claims or because a settlement would be more efficient than individual suits for damages. But much as petitioners attempt to present this case as involving those issues, it does not. The decision below was not based on the projected efficiencies of a

scheme of alternate dispute resolution or on a desire to find a "better way"; it was based on a very real need to protect this class from losing its only chance at recovery. The principal issues actually presented here have thus been settled for hundreds of years, and there is no reason for this Court to revisit them. For the foregoing reasons, the petition should be denied.

Dated: March 31, 1997

Respectfully submitted,

Paul J. Bschorr
Richard B. Sypher
David F. Owens
DEWEY BALLANTINE
1301 Avenue of the Americas
New York, NY 10019
(212) 259-8000

Counsel for Respondent Pacific Indemnity Company

Herbert M. Wachtell*
Meyer G. Koplow
Jeffrey M. Wintner
Meir Feder
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, NY 10019
(212) 403-1000

Counsel for Respondents Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company

* *Counsel of Record*

Additional Counsel for Respondent Continental Casualty Company, CNA Casualty Company of California and Columbia Casualty Company:

Rodney L. Eshelman
Donald T. Ramsey
CARROLL, BURDICK
& MCDONOUGH
44 Montgomery Street, Suite 400
San Francisco, CA 94104
(415) 989-5900

Stuart Philip Ross
Sean M. Hanifin
Merril J. Hirsh
ROSS, DIXON & MASBACK, L.L.P.
601 Pennsylvania Avenue, N.W.
North Building
Washington, D.C. 20004
(202) 662-2000

Otis Carroll
Bill Parker
IRELAND, CARROLL
& KELLEY, P.C.
6101 S. Broadway, Suite 500
Tyler, TX 75703
(903) 561-1600

Additional Counsel for Respondent Pacific Indemnity Company:

John H. Minton
Michael E. Jones
POTTER, MINTON, ROBERTS,
DAVIS & JONES, P.C.
P.O. Box 359
Tyler, TX 75710
(903) 597-8311